IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION, et al.,
Petitioners,

v.

THE HONORABLE HUGH STUART,
JUDGE DISTRICT COURT IN AND FOR
LINCOLN COUNTY, NEBRASKA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Brief of
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND As Amicus Curiae

---

LAWRENCE SPEISER
1225 19th Street, N.W.
Washington, D.C. 20036

Attorney for The
Reporters Committee
For Freedom Of The Press
Legal Defense and Research
Fund, *Amicus Curiae*

ABE DUPLICATORS, INC.–1732 Eye Street, N.W.–Washington, D.C.–298-8637

I N D E X

Citations

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-817

NEBRASKA PRESS ASSOCIATION, et al.,

Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT IN AND FOR LINCOLN COUNTY, NEBRASKA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Brief of
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND As Amicus Curiae

---

Opinions Below

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, are set forth at Cert. App. 1a and

9a.[1]/ The per curiam statement of the Nebraska Supreme Court, issued on November 10, 1975, is set forth at Cert. App. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975, is set forth at Cert. App. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975, is set forth at Cert. App. 29a. The opinion of Mr. Justice Blackmun, dated November 20, 1975, is set forth at Cert. App. 35a. The majority concurring and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975, are set forth at Cert. App. 44a and are reported at 63 Neb. S.C.J. 782, ___ N.W.2d ___. The Orders of this Court, dated December 8, 1975, and December 12, 1975, inter alia, granting the motion for petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting said Petition are set forth at Cert. App. 70a and 71a. Except as indicated above, none of said opinions is thus far reported.

Jurisdiction

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (3).

1/ All references to prior opinions in this brief are to the appropriate pages of the Appendix to the amended petition for certiorari.

Consent of the Parties

All parties to this litigation by their attorneys, have consented to the filing of this brief.

Questions Presented

1. Whether, consistent with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the press of information obtained from public court proceedings, from public court records, and from other sources about pending judicial proceedings involving an adult.

2. Whether this Court should address itself in any way to that portion of the Nebraska Supreme Court decision giving a trial judge discretion to seal all pretrial proceedings he believes may elicit information "likely" to prejudice the defendant's ability to obtain an impartial jury when that issue was neither briefed nor argued in the courts below.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Interest of Amicus

The interest of the Amicus, The Reporters Committee for Freedom of the Press (Legal Research and Defense Fund) 2/ in the question of the constitutionality of restrictive orders is well-known to this Court, Amicus having filed a brief Amicus Curiae in this case on November 5, 1975, in support of Petitioners' Application for

---

2/ Members of the Steering Committee of The Reporters Committee for Freedom of the Press are: Elsie Carper of The Washington Post, Lyle Denniston of The Washington Star, Fred P. Graham of CBS News, Jack C. Landau of the Newhouse Newspapers, Robert C. Maynard of The Washington Post, Jack Nelson of the Los Angeles Times, Eileen Shanahan of The New York Times, Howard K. Smith of ABC News, Kenneth Auchincloss of Newsweek, Walter Cronkite of CBS News, John Kifner of The New York Times, John Wood of The Boston Globe, Joel Weisman of The Washington Post-Chicago Public News Center, Grace L. Mastalli of the College Press Service, Gene Miller of The Miami Herald, and Wilson F. Minor of the New Orleans Times-Picayune. (Press affiliation for identification purposes only.)

a Stay, No. A-426, stay denied, December 12, 1975, Cert. App. 71a, 3/ and Amicus having appeared previously before this Court in United States v. Dickinson, cert. denied, 414 U.S. 979 (1973); Rosato v. Superior Court, No. 75-919 (pending on petition for a writ of certiorari); Newspapers, Inc. v. Blackwell, stay denied, 421 U.S. 997 (1975); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (application for stay granted); and Times-Picayune Publishing Corp. v. Schulingkamp, 420 U.S. 985 (1975) (dismissed as moot).

News reporters and editors, in their representative capacities as employees of news organizations and in their individual capacities as professional journalists, believe that the order in this case imposes impermissible limitations on their rights and obligations to gather and publish information about the criminal justice system, and will, if affirmed by this Court, start the nation's trial judges down the legal road toward a secret court system.

Amicus submits that this order directly and adversely interferes with the working news reporters and editors who, in most instances, are thelink between information and comment about the court system on the one hand and the average citizen on the other. Few citizens can come to a courthouse to view public records or attend public proceedings. They depend upon the

---

3/ In that brief and a Supplemental Brief filed on November 12, 1975, Amicus addressed primarily the question of the jurisdiction of this Court or a Justice of this Court to grant a stay of the District Court's restrictive order, a question no longer presented for decision.

press to report and analyze court cases, an obligation which the press today is taking more seriously than ever before.

Newspapers, news magazines, television, radio and other media increasingly are assigning reporters -- many of them with legal training -- to specialize in reporting on judicial proceedings. Bar associations are conducting seminars, and their members are attending classes, to learn how to help the press bring information about the court system to the public. The gag order in this case, if upheld, will reverse this trend toward more and better judicial reporting and will encourage similar secret proceedings in other states.

Summary of Facts

With respect to a public pretrial proceeding involving charges against a suspect accused of murdering six persons in Sutherland, Nebraska, the Nebraska Supreme Court ruled that the trial court judge could restrain the "news media" from the publication or republication of:

> "[T]he existence or content of . . . (1) Confessions or admissions against interest made by the accused to law enforcement officials . . . . (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings." Cert. App. 64a.

The Supreme Court of Nebraska order therefore applies to information obtained from open-court proceedings, from open-court and other public records and from other informational sources, including persons who may in no way be under the jurisdiction of the trial court or even of the courts of Nebraska.

The Supreme Court of Nebraska, without hearing argument on the question, also authorized the trial judge to seal any pretrial proceedings which might produce evidence inadmissible at the trial and would therefore be "likely to interfere" with the defendant's right to obtain an impartial jury.

Statement Of The Case

The facts and prior decisions in this case are detailed in the briefs of the parties; Amicus Curiae will address itself to certain aspects of this case that are particularly relevant to the arguments to be made herein.

Sometime on October 18, 1975, six members of the Henry Kellie family of Sutherland, Nebraska, were brutally killed in their home. Less than three months later, Erwin Charles Simants, a resident of Sutherland and a Respondent here, was convicted on six counts of first degree murder by a jury chosen from the jurisdiction within which the killings had occurred. 4/ During the time between the deaths of the Kellies and the conviction

---

4/ These facts are taken from Brief of Petitioners at 18-21, supplementing the facts of record that occurred prior to this Court's grant of a writ of certiorari.

of Respondent Simants, Petitioners were subjected to direct prior restraints of varying degrees and forms on the reporting of these crimes and their attendant judicial proceedings that, simply put, were almost unprecedented in American jurisprudence. Whether these direct prior restraints were valid under the First Amendment is, of course, now the question before this Court, but Amicus takes the position that, in deciding this question, this Court should pay particular attention to certain aspects of this case that Amicus thinks deserve special emphasis.

Shortly after the killings occurred, word of these mass slayings spread quickly throughout the small community of Sutherland. The initial reaction of this community, as reported by the press including some of Petitioners here, was one of great distress and fear. Rumors that a sniper was on the loose in the community apparently spread by word of mouth and kept this small community in a state of fear for a substantial period of time, apparently causing many residents of the community, on the advice of law enforcement officials, to retreat within their homes, locking their doors in hopes of preventing similar occurrences. Reports of prowlers were made to police, and police set up roadblocks around Sutherland, searching each car for the murderer. 5/

Shortly after the killings, Respondent Simants made statements concerning his complicity in them to several relatives. At no point in this case has it ever been suggested that the admission of such statements in the trial of Simants could have

---

5/ Joint Appendix at 83-84, 88, 89, 92, 96, 97 (hereinafter cited as J.A.).

been proscribed under the Federal Constitution. Amos Simants, the father of Respondent Simants, having been told of the killings, repeated the details, including his son's complicity to a resident of Sutherland who in turn gave this information to the media. 6/ The media, exercising its editorial prerogative and responsibility in a community shaken by these heinous crimes, reported accurately and fully the substance of Simants' statements in the context of their coverage of the crimes and Simants' arrest for these crimes on October 19, 1975. From that date until the restrictive order of the County Court went into effect on October 21, reporting of these crimes and Simants' subsequent arrest consisted, insofar as the record in this case shows, of straight reporting.

During this period, the press reported fully and accurately that the Court Attorney, a Repondent here, had stated to the media that he had a "theory" which would perhaps explain the motive for the killings and that this "theory" would perhaps be borne out in an autopsy report. J.A. 85, 88. 7/ Also during this period prior to the preliminary hearing Repondent Simants was arraigned in a proceeding partially closed to the press and public at the request of the County Attorney and apparently over the objection of Simants' own counsel. J.A. 7.

By the time the preliminary hearing was held on October 22, the rumors concerning

---

7/ The source of this information was apparently the County Attorney. The Lincoln County Sheriff was quoted in several articles in which he gave information that Simants had given to him. See J.A. 83,89.

a sniper and the fears of the Sutherland community had been eliminated or allayed at least in part, if not completely, by the media coverage of the case. At that hearing, described in detail by the Petitioners in their brief, the Lincoln County Sheriff testified that he had taken two "statements" from Simants, one of which was subsequently described in that hearing by Simants' own counsel as a "confession." J.A. 16.

From the time the County Court entered its order, dated October 22, 1975, until the petit jury selected to try Respondent Simants had been impaneled on January 8, 1976, Petitioners scrupulously obeyed the successive orders and modifications thereto of the District Court, Mr. Justice Blackmun, and finally the Supreme Court of Nebraska. From October 22 until January 8, citizens of Sutherland and the surrounding area, indeed all the citizens of Nebraska who had not actually been in attendance at the preliminary hearing, who desired more information on the case -- including information related to the performance of their duly elected public officials in the matter -- had either to go to the courthouse and peruse documents on file there, read truncated versions of the facts of the case as reported by national media not bound by any of the existing orders, 8/ or after December 1, 1975, read or listen to information disseminated by any Nebraska media other than Petitioner themselves. 9/

8/ See, e.g., Newsweek, Dec. 8, 1975, at 87.

9/ Under the terms of the Nebraska Supreme Court's decision, all media other than Petitioners were free from the strictures of the various orders.

Yet, as Petitioners have noted, a jury was impaneled without extraordinary effort after Simants' motion for a change of venue was denied.

ARGUMENT

Introduction

The Reporters Committee for Freedom of the Press submits this brief Amicus Curiae in support of Petitioners, Nebraska Press Association, et al., challenging the validity of a pre-publication injunction barring the press in Nebraska from publishing news of general information about a pending adult criminal proceeding.

This Committee was the only Amicus Curiae which entered this case while it was pending before Mr. Justice Blackmun because it believed then -- as it believes now -- that this Court has both a constitutional and public policy obligation to the citizens of this nation to resolve the growing legal confusion and institutional hostility between the press and the courts which has developed in the decade since this Court's decision in Sheppard v. Maxwell, 384 U.S. 333 (1966).

What has developed in this case is symptomatic of fair trial-free press litigation all over the nation:

*The judiciary -- as represented by a local county trial judge, then the Nebraska Supreme Court and then a Justice of this Court -- has arrogated to itself the sole power to decide when, and under what circumstances, the public is to be informed about the operation of the criminal courts even though it is mandated by the First Amendment that the press, and not the

courts, is free to decide whether information about the adult criminal justice process should be published or not.

*The judiciary has arrogated to itself, by the long delays in both this Court and the Nebraska Supreme Court, the sole power to decide when information about the courts may be published by the simple expedient of continuing since October 22 a prior restraint order based on sheer speculation as to the potential danger of news, an action which is under all the decisions of this Court presumptively invalid on its face.

*The judiciary has arrogated to itself, by that section of the Nebraska Supreme Court decision authorizing the wholesale sealing of pretrial proceedings, the right to exclude the public and press from crucial stages of the criminal justice process when this issue was not argued or briefed in the trial court or in the Nebraska Supreme Court; and has authorized these secret court proceedings on the vague indefinable standard that information from these proceedings is "likely" to interfere with the ability to select an impartial jury.

The trust and confidence that the public of this nation has in its court system primarily stems from the historical fact that, as opposed to the secrecy prevalent in the executive and legislative branches of government, the courts have always been open to the public -- unafraid to subject their actions to the most intense public scrutiny and inspection.

The Nebraska Press Association case to date stands for the principle that the judiciary is about to embark on the very type of secrecy which so frequently has been responsible for corruption in other

branches of government and the undermining of public confidence in their integrity.

We beg this Court to consider the damage that will ensue should it affirm the Nebraska Supreme Court decision and unalterably set the press of this nation against the judiciary with all the attendant constitutional and political evils for both institutions that will surely result from this type of confrontation, a confrontation that is unprecedented historically, unwise politically and unjustified constitutionally.

If this Court in any way encourages the thousands of politically appointed or politically elected trial judges in the nation to suppress information about the courts -- either by direct prior restraints or by secret proceedings -- it will not have arranged a balance between the First Amendment and the Sixth. It will have extinguished the First Amendment in relation to news of the judiciary and will have informed the judiciary that it can avoid its obligations to suffer the discomfort of public inquiry.

Indeed, this Court is itself the model. With rare exceptions, every proceeding and document of this Court are open matters of oublic record for all to hear and see and for all to subject to the robust debate of a free society.

While there are those who may disagree with the decisions of this Court, there are few, if any, who can challenge its reputation for the highest integrity and trust, a trust built on the firm foundation of truth and openess; a trust which should, by decision of this Court, under the Constitution be the rule, and not the exception, for the inferior courts of the land.

I.

IT IS A VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR AN INJUNCTION TO ISSUE PROHIBITING PUBLICATION BY THE PRESS OF INFORMATION OBTAINED FROM PUBLIC COURT PROCEEDINGS, FROM PUBLIC COURT RECORDS, AND FROM OTHER SOURCES ABOUT PENDING JUDICIAL PROCEEDINGS INVOLVING AN ADULT

A. This Court should re-examine the underlying assumption of Sheppard v. Maxwell, 384 U.S. 333 (1966), because recent history and cases before this Court and other courts involving Watergate, My Lai and other highly publicized trials show that jurors can reach impartial verdicts in cases surrounded by massive pretrial publicity.

When this Court decided Sheppard v. Maxwell, its decision rested in part on an untested assumption -- which appeared reasonable at that time -- that trial judges, months before the jury selection process, could accurately predict that certain types of news about a criminal case would result in irreparable injury to the defendant's Sixth Amendment rights to a fair trial by making it impossible to obtain an impartial jury.

Based on that assumption, this Court in Sheppard appeared to approve of court rules limiting access by the press to parties, witnesses, attorneys and prosecutors; and indirectly suggested that penalties might be available against "recalcitrant" news reporters and news organizations which published prejudicial information.

We now would appear to have overwhelming factual evidence that the assumption of

Sheppard has been contradicted by recent history and the rulings of this Court -- that, in fact, it is possible to inundate a community with publicity about a case and yet find a fair jury panel. For example, surrounded by the most massive pretrial publicity imaginable:

* A jury in New York acquitted former Attorney General John N. Mitchell and former Secretary of Commerce Maurice Stans. United States v. Mitchell, CR. 73-439 (S.D. N.Y. 1974).

* A jury in the District of Columbia convicted Watergate burglar E. Gordon Liddy. The United States Court of Appeals for the District of Columbia affirmed that conviction and this Court denied Mr. Liddy's petition for certiorari which claimed that publicity had made it impossible to select an impartial jury. Liddy v. United States, 420 U.S. 911 (1975).

* A jury in the District of Columbia convicted former White House aide Dwight Chapin. The United States Court of Appeals for the District of Columbia affirmed Mr. Chapin's conviction, and this Court denied Mr. Chapin's petition for certiorari arguing that pretrial publicity had made the selection of a fair jury impossible. Chapin v. United States, No. 75-401, 44 U.S.L.W. 3344 (U.S. Dec. 3, 1975).

* A jury in the District of Columbia acquitted former Governor John Connally. United States v. Connally, CR. 74-440 (D. D.C. Apr. 18, 1975).

* A court martial convicted Lieutenant William Calley. A United States District Court reversed the conviction on a finding that publicity had made it impossible to obtain a fair jury panel. The United

States Court of Appeals for the Fifth Circuit reversed en banc and found that Lieutenant Calley had received a fair trial. Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975).

* This Court, in Murphy v. Florida, 421 U.S. 794 (1975), found that specific knowledge by members of a jury about a defendant's prior criminal background was not enough to show that the jury was not impartial in deciding the case.

* Other examples of massive publicity adverse to the defendants -- perhaps not of the intensity and scope of Watergate and My Lai -- have resulted in acquittals for Angela Davis, Bobby Seale, and the Gainesville Eight.

Amicus doubts that this Court could, as a general rule, posit any present situation in this case or any future situations in other cases which could result in more adverse publicity than was generated by Watergate, surrounded as it was by publicly televised proceedings before the Senate in a non-adversary setting, or by the My Lai incident.

Amicus believes that trials involving Watergate, My Lai, Angela Davis, John Mitchell, Lieutenant Calley, and this Court's decision in Murphy v. Florida clearly affirm the traditional faith we have in our jury system -- that once a juror takes his oath, to judge a case only on the evidence produced in the courtroom, he is able to serve impartially and he disregards previous news reports prejudicial to either the defense or the prosecution.

The Nebraska Supreme Court decision -- and Mr. Justice Blackmun's decision in this case -- stand for the proposition that

jurors are not to be trusted to carry out their duties in the fair manner in which juries in this nation have operated for the past 200 years.

Amicus fails to see how in any given case -- whether it be Watergate or the Nebraska trial at issue in this case -- this Court can decide that a trial judge, before the jury selection, can accurately determine that the selection of a fair jury will be impossible because of news reports, and therefore the trial judge must be given broad powers to extinguish the rights of an independent and free press to bring the public news reports about the case.

Amicus does concede that there are rare instances -- in the more than one million felony cases tried every year in this nation -- where, in fact, news accounts have made it impossible to obtain a fair jury in a locality. See Rideau v. Louisiana, 373 U.S. 723 (1963).

But as opposed to the irreparable injury which the press and the public suffer from a ban on gathering and publishing news about a criminal case, there is no irreparable injury to the defendant. He may ask for a delay and for a change of venue. His ultimate remedy is, and has traditionally been, to obtain a mistrial and then a new trial, a remedy that has been frequently ordered by this Court for numerous types of trial errors without any suggestion that an occasional mistrial will cause a clear and present danger to the administration of justice.

B. The order before this Court violates the First Amendment because it is overbroad and vague; and because the supervision of such vague orders imposes impossible burdens on federal and state appellate courts, while subjecting the press to unconstitutional censorship pending appeals.

The issue before this Court, lifted from the complex background of the case, is the constitutionality of the opinion and judgment of the Supreme Court of Nebraska that authorized a direct prior restraint on the reporting, "the existence or content of . . . (1) Confessions or admissions against interest . . . (2) . . . excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings," Cert. App. 64a, and the holding of the Nebraska Supreme Court that the trial judge, in his sole discretion, may close any pretrial proceedings when he believes that inadmissible information from these proceedings may make it "likely" that an impartial jury cannot be impaneled.

At the outset, Amicus would point out that the category of information -- "implicative of the accused" or "likely" to deprive him of a fair trial -- identified by the Supreme Court of Nebraska will not be adressed at length here for the reason that these categories are incapable of meaningful definition and are clearly unconstitutionally vague and also overbroad under the First and Fourteenth Amendments if those concepts continue to have a place in the jurisprudence of this Court. See Smith v. Goguen, 415 U.S. 566 (Powell, J.) and 583 (White, J., concurring) (1974). To the extent that these categories might be thought to encompass specific types of

information such as prior criminal records, (see the Chambers opinion of Mr. Justice Blackmun, Cert. App. 41a), it can only be observed that, should this Court conclude that prior restraints as to confessions are invalid, then it would follow a fortiori that no prior restraints on other types of information could be thought constitutional.

As Petitioners in their brief in this case have forcefully argued, the precedents of this Court and other federal and state courts in no way support and in fact cut squarely against the proposition that the First Amendment tolerates the direct judicial restraint on news related to criminal judicial proceedings that has existed, in one form or another, since October 21, 1975, in this case. Nor, as Petitioners point out, Brief for Petitioners at 41-44, do any of the studies of the broad concerns from which this case evolved recommend the imposition of direct restraints on the press. Yet without so much as a suggestion as to why our constitutional experience of two centuries must suddenly be discarded, two state trial judges, five judges of the highest court of the State of Nebraska and a Justice of this Court have concluded that the past is no longer a sufficient guide and that we must start off down a new road that has consistently been eschewed by this Court in every case before it dealing with this question since Patterson v. Colorado, 205 U.S. 454 (1907).

Before starting down that road, Amicus would most respectfully suggest that this Court seriously consider the pitfalls that most certainly mark this uncharted path. If this Court is to case aside the principle that the press is both free to report and responsible for the reporting of open court proceedings and records before the ink is dry on Cox Broadcasting Corp. v.

Cohn, 420 U.S. 469 (1975), this Court should be aware that it would be rejecting a principle that has heretofore gone unchallenged in our constitutional history. And before this Court starts down the slippery slope of granting a license to every one of thousands of trial courts to enter prior restraints against the press in cases in which fact patterns are as varied as the number of cases themselves, this Court should be aware that the appellate capacity of this Court as well as lower federal and state courts does not exist to control, without grave and irreparable damage to the First Amendment interests involved, the exercise of such an unprecedented power by those trial courts. Amicus believes that, after full consideration of all of the ramifications that would inhere in an affirmance of the decision of the Supreme Court of Nebraska, it will surely reverse that decision.

C. The order of the Nebraska Court violates the First Amendment because it violates the unbroken line of decisions of this Court that the judiciary has no special prerequisite to impose prior restraints on its proceedings and therefore to be free from full public scrutiny and debate.

As Petitioners have argued, Brief for Petitioners at 28, the principle enunciated in Cox, derived from an unbroken chain of cases in this Court, clearly controls the validity of most of the prior restraints imposed by the Supreme Court of Nebraska, and, were the restraints herein applicable only to information that came out in the open court hearing, the judgment before this Court would surely warrant summary reversal. But as the records show there was in this case publicity given to Respondent Simants' extrajudicial statements

as well as the reporting of his having given a "statement" to authorities, that took place prior to the preliminary hearing on October 22. Thus, publication or republication of facts already in the public domain has been subjected to a direct prior restraint, raising the question whether the significant policies underlying the rationale of Cox are of any less force in the context of reporting a crime of the earlier stages of the criminal process that are not brought out in open court.

Two fundamental principles might be thought to constitute the underpinning of Cox. One such principle, derived from Craig v. Harney, 331 U.S. 367 (1947), and reiterated in such cases as Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966), would appear to implicate the values enshrined in the public trial provision of the Sixth Amendment and articulated by Mr. Justice Black in his opinion for the Court in In re Oliver, 333 U.S. 257 (1948). But Cox, while it relied on cases implicating the public trial provisions of the Sixth Amendment, did not cite Oliver or purport to be grounded in the Sixth Amendment. Cox, then, must be said to rest on the principles articulated by Mr. Justice White for the Court:

> "[I]n a society in which each individual has but limited time and resources with which to obscure at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without

> the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." 420 U.S. at 491-92.

Amicus takes the position that no reasonable distinction can be drawn between the special protection of the First Amendment and this Court's decision in Cox for the reporting of open court proceedings and the reporting of other stages of the administration of criminal justice. In the first place, there are perhaps no areas of governmental operations that are of greater moment and concern to the citizens of this country than the operation of the entire criminal justice system. This is true not only from the viewpoint of the accused, but from the viewpoint of the victim of crime and the citizen who lives in the constant danger and perhaps fear of becoming a victim of crime. Particularly within a system of criminal justice in which only a small percentage of criminal prosecutions, once initiated, ever go to trial, the need for exposure of that process from inception to completion to the light of press reporting is clear and overriding.

The case before this Court is a prime example. Six members of a small community are found brutally murdered, setting off a widespread reaction of the citizenry of fear and concern for their own safety. The need in such a situation for the widest and fullest dissemination of information

concerning whether, and to what extent, the criminal justice system has responded to such an event cannot be subject to serious question. Yet, instead of being permitted to perform this necessary and historic function that they had in fact performed between October 19 and October 21, Petitioners were ordered by a state trial court to abandon that performance at a time when it was uncertain whether it would ever be necessary even to impanel a jury.

That Petitioners were responsibly performing that historic function is evident from even a cursory reading of the articles devoted to the killings that appear in the Joint Appendix filed in this case, J.A. 81-98, articles used to justify the imposition of the prior restraint order by the District Court and the Supreme Court of Nebraska.

Amicus takes the position that the citizens of any community of any size are entitled to have their press report to them all facts related to crime that they need to be assured that their public servants, here law enforcement officials, are adequately performing their jobs. Nor is Amicus' argument limited in scope to the initial wave of publicity, which, incidentally, has never been thought by this Court to present a substantial hazard to fair trials due to the lapse of time normally associated with bringing a case to trial. See Murphy v. Florida, 421 U.S. 794 (1975).

D. The order in this case violates the Sixth Amendment ruling of this Court in Murphy v. Florida that jurors can know adverse information about a defendant and render a fair verdict, and this Court's interpretations of the fair trial provisions of the Sixth Amendment.

If the rejection of the Cox principle as applied to a "confession" or other extra-judicial inculpatory statements is only implicit in the opinions of Mr. Justice Blackmun and the Supreme Court of Nebraska entered in this case, 10/ their rejection of the rationale of this Court's more recent decision in Murphy v. Florida, 421 U.S. 794 (1975), would appear to be even clearer. The facts of Murphy are certainly fresh in this Court's mind and need not be restated here. Suffice it to say that most of the actual petit jurors that sat in judgment of Murphy had prior knowledge of Murphy's extensive prior criminal record, the facts related the crime for which he was being tried, and certain "statements" made by Murphy and his attorneys prior to trial.

This Court, with only Mr. Justice Brennan dissenting, held that Murphy had not been denied a fair trial by impartial jury as guaranteed by the Sixth Amendment. In his Chambers opinion of November 20 in this case, Mr. Justice Blackmun indicated without citation to Murphy that "facts associated with the accused's criminal record," and facts "associated with the circumstances of the accused's arrest" could be enjoined from publication prior to trial. This observation was, at least on the facts as made known to Mr. Justice Blackmun

---

10/ Neither the opinion of Mr. Justice Blackmun of November 20 nor the opinion of the Supreme Court of Nebraska of December 1 would appear to attribute any significance whatsoever to the fact that the prior restraint orders in this case prohibited publication of information most of which came out at an open court hearing.

in the papers before him at that time, dictim, but the observation serves to point up the fundamental flaw that has beset the reasoning of all of the courts below. Amicus believes that flaw to be nothing more nor less than adoption of the position, squarely rejected in Murphy, that the Sixth Amendment guarantees to a defendant in a state criminal proceeding both a fair trial and the appearance of a fair trial. Amicus respectfully submits that the adoption of this position is completely at odds with every other case decided in this Court which has applied the provisions of the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment.

There are two other possible explanations for the opinions below that would serve to avoid the above conclusion. The first would be that the record in this case establishes that the publicity given to the case of Respondent Simants prior to the entry of the restrictive order of the County Court was such as to create that genuine prospect of inability to secure an impartial jury at some future date, whether under the rubric of "clear and present danger" or other tests, that in other contexts have been thought by this Court to be a threshhold requirement of imposing a direct prior restraint on the press (assuming arguendo that such a restraint would ever be permissible). As Petitioners have persuasively demonstrated, nothing in this record will support such a finding under any prior understanding of this Court of the substance of "clear and present danger" analysis. Brief for Petitioners at 61-67. The "immediacy" of the danger posed by the publication, a continuing component of

"clear and present danger" analysis, 11/ has simply never been established in this case.

But, and perhaps more importantly, the decisions and opinions written in this case up to the present evince what Amicus feels is a fundamental misconception of the nature of the "danger" that must be present if a prior restraint is even arguably consistent with the First Amendment. The Supreme Court of Nebraska advanced two and only two "dangers" that were thought by it to satisfy the rigors of the "clear and present danger" test which it assumed to be applicable to the imposition of a prior restraint on publication.

The first danger was identified as the possibility that an accused, having actually committed a crime, would be set free because of subsequent reversal of his conviction due to prejudicial pretrial publicty; the "danger" or irreparable harm to society in that case was said to be society's loss of its right to obtain a valid conviction of a guilty person. The second "danger" identified by the Supreme Court of Nebraska is that an accused who is in fact innocent of charges will be wrongly convicted and forced to forfeit his liberty for that period of time it takes appellate or federal habeas courts to right the wrong.

11/ In New York Times Co. v. United States, 403 U.S. 713 (1971), the Solicitor General argued tc this Court that immediacy of the danger posed to society by publication was no longer a component of the analysis of prior restraints; that argument was decisively rejected in the judgment of this Court in that case.

Cert. App. 62a. As Amicus points out, infra n. 16, the former "danger" is, in our jurisprudence, a hypothetical case, and the latter "danger" involves a wrong, however, irreparable, that is a price our society frequently incurs in return for maintenance of an orderly system of justice.

But, even assuming that some cases could be found in which society had lost its right to retry an accused after reversal due to prejudicial publicty and that some persons subsequently acquitted of a crime in fact spent time in prison before an impartial jury finally gave them justice, would those facts alone form the basis for a finding of that quality of "danger" that would perhaps justify the imposition of a direct prior restraint on publication?

Amicus submits that such facts would not, and that the only sufficient ground for this Court's approval of a direct prior restraint on publication of facts and opinions related to criminal proceedings would be a conclusion by this Court, based upon evidence of record, that media coverage of the criminal justice process generally had reached the point where a grave threat was posed to the functioning of that system and the confidence of the citizenry in the ability of the system to try defendants fairly. If this Court is prepared to find that such a threat to the integrity of the criminal justice system presently exists, it should do so explicitly and lay on the public record the evidence upon which the finding is based. If such evidence exists, it is most certainly not presented in the record in this case, J.A. 81-98, nor is Amicus aware of any evidence dehors the record that would support such a finding. Indeed, in this case, the Supreme Court of

Nebraska apparently found that Petitioners had at all times acted responsibly and within the terms of the voluntary bar-press guidelines that were originally made mandatory by both the County and District Court. Cert. App. 62a.

If this Court is not prepared to find a general threat to the integrity of the criminal justice system posed by the publicity in this case, but nevertheless sustains the decision of the Supreme Court of Nebraska, it will have to hold that a direct prior restraint on publication can be imposed in circumstances in which publishers could not be held in contempt under the standards set forth in cases such as Bridges v. California, 314 U.S. 252 (1941), and Craig v. Harney, 331 U.S. 367 (1947).

The second possible explanation and justification for the actions of the courts below and for Mr. Justice Blackmun's opinion of November 20 is that certain types of information or editorial comment are so inherently prejudicial or inflammatory that exposure to them well in advance of trial must necessarily be held to disqualify a person so exposed from jury service in that case. 12/ Such a principle, at least as

---

12/ Even if this contention could be established as a matter of law for fact, both Mr. Justice Blackmun and the courts below also appear to have made the critical assumption that such a significant number of potential jurors would be exposed so as to preclude the selection of a petit jury at some future date which had not been exposed to such publicity. Amicus would point out that not only does the record in this case not support such an assumption, but that the Supreme Court of Nebraska's reliance on the population statistics of Lincoln

applied to confessions or like material is not established by the cases relied upon by Mr. Justice Blackmun, 13/ nor has it been confirmed through any sociological or psychological studies of which Amicus is

---

12/ (Cont.) and adjacent counties to substantiate this assumption is analytically unsound. Nothing in the Federal Constitution requires the State of Nebraska or any other state to provide for any change of venue to a court outside the political subdivision in which a crime occurs. Indeed, Nebraska would be perfectly free, as a matter of state policy, to limit venue in the Simants case to Lincoln County. If, in so doing, it subsequently became clear that Simants could not receive a fair trial in Lincoln County, the state could not obtain a constitutional conviction of Simants, not because of a federal constitutional prohibition on venue but because of the state's decision to recognize its own policty of limiting venue.

13/ To read Rideau v. Louisiana, 373 U.S. 723 (1963), as supporting such a per se rule as Mr. Justice Blackmun apparently did in his opinion of November 20, Cert. App. 40a-41a, is to ignore both the unique facts of Rideau itself and every case in this Court which has sought to explain this Court's subsequent understanding of the Rideau decision. Nothing in this Court's decision in Irvin v. Dowd, 366 U.S. 717 (1961), selects out confessions or any other type of information as inherently disqualifying one exposed to it for jury service.

is aware. 14/ To the extent that the principle is based on the notion that simple massive publicty of any kind will inevitably result in conviction of the innocent, that notion has already been refused in Part I, A supra.

To adopt such a principle, encompassing either specific types of information or massive publicty of any kind would, more importantly, put this Court in the position of establishing a per se rule on the basis of no more than sheer speculation. The establishment of any per se rule in this area was specifically eschewed by this Court in Murphy v. Florida, and Amicus respectfully contends that to reverse that position in this case would be not only error but error carrying with it enormous consequences for the administration of criminal justice in this country.

This is so for two reasons. First, because the basic inquiry in each case would be shifted from an inquiry into the actual predisposition of petit jurors to convict to a completely generalized inquiry into the nature of publicity occurring at the outset of a criminal prosecution. That publicty normally occurs with more intensity and with greater frequenty at the initial states of the criminal process is both a common phenomenon and is justified by the need for the general public to become aware that the criminal process is

---

14/ See Brief of Petitioners at 30-31, n. 11. Amicus doubts that any empirical studies which did not use actual cases, juror exposure to publicity over a period of time and actual jurors as controls would be valid.

functioning properly at that point in time. Thus, in the usual course of events, extensive publicty will have occurred before a court possessing jurisdiction to enter a restrictive order will be able to do so, and such a situation would make a reasonable case for at least a delay or change of venue. 15/

Second, because it is impossible to differentiate between "types" of information that might logically be thought to fall within such a per se rule. Both Mr. Justice Blackmun, using such language as "There may also be facts that are not necessarily implicative, but that are highly prejudicial . . .," Cert. App. 41a, and use of the phrase "Other information strongly implicative of the accused as the perpetrator of the slayings" by the Supreme Court of Nebraska, Cert. App. 64a, concede as much. And they are certainly correct. For example, is this Court prepared to find that the fact of the existence of a statement made to authorities is any more inherently prejudicial when generally publicized within a community than the disclosure that someone accused of a brutal rape-murder provided law enforcement officials with the location of the victim's body? Yet precisely that information was subjected to a direct prior restraint by the

---

15/ Indeed, if Mr. Justice Blackmun's opinion of November 20 were to be read as adopting a per se rule regarding certain types of information that are inherently prejudicial, it would seem that Respondent Simants' motion for a change of venue should have subsequently been granted, rather than denied as it was by the District Court.

courts of the State of Louisiana in a case permeated with what was characterized by Mr. Justice Powell as something less than "responsible journalism." Mr. Justice Powell, correctly in Amicus' view, chose to stay the prior restraints imposed by the state courts in that case, a case perhaps more laden with the potential for community prejudice than the instant one. Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974). Were the per se approach at least implicity in the judgments and opinions below to be adopted, Amicus would suggest that it would result in a virtually total ban on meaningful coverage of crime and the criminal process by the media. It would blink reality to suggest that the cost of such massive constriction on the flow of information concerning the criminal justice system is either worth paying 16/ or will not come to

16/ Balanced against this cost is the spectre, advanced by the Supreme Court of Nebraska, of society's losing its right to convict a guilty person or an innocent person's being incarcerated until such time as an unfair conviction is reversed. Cert. App. 62a. As for the former, not only is Amicus unaware of any reported case in which society has ever lost its right to bring an accused to trial after a reversal of a conviction tainted by prejudicial publicity, but this Court and the Supreme Court of Nebraska must certainly be aware that the convictions of admittedly guilty persons are reversed with regularity to implement the policies of the Fourth Amendment where no chance for retrial is available. As for the latter, incarceration during both the pretrial and posttrial stages of the criminal process of innocent persons is an unfortunate but accepted price we pay for our instance upon an orderly system of justice. See Gerstein v. Pugh, 420 U.S. 103 (1975).

be paid. 17/

E. The order in this case violates the First Amendment presumption against the validity of prior restraints because -- under the guise of deciding the order -- the press of Nebraska has been effectively censored since October 11.

The point Amicus would make in this regard is simply stated: if the Sixth Amendment does not of its own force require state trial judges to avoid the appearance of an eventual unfair trial, then a direct prior restraint substantiated by nothing more than what is in the record in this

17/ Mr. Justice Blackmun's observation that prior restraints on the press limited to the pretrial stages of the criminal process "may delay media coverage . . . but at least they do no more than that . . .," Cert. App. 40a, is inconsistent with this Court's oft-stated position that contemporaneous reporting of newsworthy events is often the touchstone to whether information gets communication at all. See, e.g., Bridges v. California, 314 U.S. 252 (1941). In short, old news is no news at all. Furthermore, as illustrated by this case, publication in January 1976 of facts concerning the operation of the criminal justice system in October 1975 deprived the media of playings its accustomed and valued role of keeping the public informed on a current basis concerning the performance of their public servants, particularly whether their safety had been secured by the arrest of the probable killer of six members of their community.

case cannot be sustained unless this Court is willing to stand on its head the assumption that lies at the core of the doctrine of prior restraint.

This assumption has been, at least in this Court and until this case, that the showing necessary to justify a direct prior restraint is so extraordinary that only certain hypothetical examples, such as the publication of the sailing date of troop transports during war time, have been suggested as warranting the imposition of a direct prior restraint. Certainly were this Court to read the Sixth Amendment as compelling trial judges to enter restrictive orders like the one in this case to protect the appearance of a fair trial, then a principled distinction between this case and other prior restraint cases could perhaps at least be articulated and a true conflict between the First and Sixth Amendments be joined. Amicus would submit that the Sixth Amendment cannot be so read unless Murphy v. Florida and other Sixth Amendment decisions of this Court 18/ are to be overruled or severely undermined.

18/ For example, in Williams v. Florida, 399 U.S. 78 (1970), this Court rejected a Sixth Amendment challenge to the use of six-man juries because that jury size allegedly prevented the impaneling of juries drawn from a cross-section of the community. It goes without saying that if a six-man jury were to be thought as a minimal requriement of the Sixth Amendment to preserve a fair cross-section, a jury larger than that might be constitutionally required were the Sixth Amendment to be read as protecting the appearance of a fair trial.

In his concurring opinion in New York Times Co. v. United States, 403 U.S. 713, 733 (1971), Mr. Justice White, joined by Mr. Justice Stewart, quite correctly noted the "infrequency of prior restraint cases" coming to this Court. Prior restraint cases pose difficulties encountered only infrequently by this Court and other appellate courts, federal and state, in the past due to the long-understood prohibition against the entry of direct prior restraint orders against the press. Amicus takes the position that this Court, if it is to reverse this long tradition, should at least take into account the problems such an action may reasonably be expected to generate.

The potential for the frequency of the entry of direct prior restraints on the reporting of facts concerning the pretrial phase of the criminal justice process is limited only by the number of cases prosecuted or, for that matter, the number of crimes committed that come to the attention of the press. Whether such potential will be realized is, of course, dependent on the proclivities of prosecutors, trial judges and defendants, as well as a variety of other factors. Perhaps a portent of what may be expected is provided by the recent entry of two orders by the District Court of the General Court of Justice, District Court Division, in the County of Columbus, North Carolina. That court, on mother of a defendant charged with rape and first degree burglary in matters 75 CR 9298 and 9299, entered on October 28, 1975, without a hearing, identical orders which read, in pertinent part:

> "IT IS THEREFORE ORDERED AND DECREED that no person, firm, or corporation shall in any manner, by radio, newspaper, television, or otherwise, publicize, report or

distribute any information whatsoever concerning the evidence witnesses, trial or proceedings in this cause without a specific order authorizing said reporting or publication from the Court."

Forty days after the entry of what must be the most extraordinary direct prior restraint ever imposed in a criminal proceeding, representatives of the media, having secured counsel, succeeded in securing from another court a stay of these orders. On January 5, 1976, that same court which had stayed the orders found them to be repugnant to the First Amendment and ordered them to be vacated. 19/

The fact that these orders could be and were entered by a state trial judge 25 years after this Court's decision in Kunz v. New York, 340 U.S. 290 (1951), is more than remarkable; it furnishes a clear example of a trial judge, having no apparent basis in law or fact, entering patently unconstitutional orders that, upon pain of contempt, commanded obedience until such time as they were reversed on appeal. In the absence of some evidence to the contrary, it would appear reasonable to assume that the trial judge who issued these orders is no more nor less schooled in the law than many trial judges throughout this country.

This Court itself has recognized in a number of cases placing substantive and procedural constitutional restrictions on

---

19/ North Carolina v. Purdie, Nos. 75 CR 9298, 9299 (Gen. Ct. of Justice, Super. Ct. Div., Columbus County, N.C., Jan 5, 1976).

the use of the criminal contempt power that some state trial judges, many of whom do not hold life tenure and who therefore are inextricably bound up in the political processes and pressures within their jurisdictions, may be "complaint, biased . . . or eccentric . . . ." Bloom v. Illinois, 391 U.S. 145, 156 (1968).

To give such judges as may fit that description the power to temporarily silence media coverage of the criminal justice system, particularly in cases involving the investigation or prosecution of crimes involving public servants or political figures, certainly poses a greater threat to the fabric of our society than would the occasional abuse of the power of criminal contempt which this Court sought to curb in decisions such as Bloom. Also in the absence of evidence to the contrary, it would appear reasonable to assume that the normal appellate process within state court systems is geared to handle such grave questions as were presented by these orders in no more nor less time than were the North Carolina courts or, for that matter, the courts of the State of Nebraska in this case.

This problem of delay in appellate review of restrictive orders has proven to be a vexatious problem in this case as well as other cases. In staying his hand on November 13, Cert. App. 21a-28a, and in granting Petitioners partial relief from the restrictive order of the District Court on November 20, Mr. Justice Blackmun clearly recognized the fact that "[w]here . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." Cert. App. 37. The irreparable injury occurring daily by virtue of the Petitioners'

observance of that direct prior restraint appears to have been the decisive factor in Mr. Justice Blackmun's taking jurisdiction and granting partial relief even though an identical request for relief had been pending in the Supreme Court of Nebraska since October 31, 1975.

The delicate problems in federal-state relations underlying this assumption of jurisdiction by Mr. Justice Blackmun do not require elaboration before this Court, which dealt only last term with several aspects of what may be referred to as the Younger v. Harris, 401 U.S. 37 (1971), problem. The potential for the exacerbation of federal-state relations were state trial judges to be given a license, no matter how restricted, to issue prior restraints in virtually any criminal proceedings, is, in a word, staggering. Passing the question whether this Court has the capacity, given its crowded docket, to give the facts of each case the careful scrutiny required on the basis of hastily submitted applications for stay, 20/ it is clear that the delay

20/ Assuming, arguendo, that a majority of this Court were to conclude that Mr. Justice Blackmun did not have jurisdiction to enter any stay on November 20, Amicus finds it difficult to believe that such a result, given the nature of irreparable loss occasioned by the imposition of an unconstitutional direct prior restraint, would not require this Court ultimately to carve out a narrow exception to the doctrine of Younger v. Harris, 401 U.S. 37 (1971), thereby giving every United States District Court jurisdiction under 28 U.S.C. § 1343(3) to step in where state appellate courts refused timely review of direct prior restraint orders. The complex federalism and res judicata questions inherent in such an exception are obvious.

occasioned in this case itself must be judged as an unacceptable price to pay.

The delay in this case is illustrative of the fact that, due to the lack of procedural due process and speedy appellate review in the formulation and review of such orders, the "heavy presumption" against the constitutionality of such orders which all members of this Court have at one time or another embraced has been, for all intents and purposes, obliterated, if not reversed outright.

Nor is the irreparable damage suffered through delay in appellate review of such orders limited to state courts or criminal proceedings. In CBS, Inc. v. Young, 511 F.2d 234 (6th Cir. 1975), a direct prior restraint imposed on, inter alia, "relatives, close friends, and associates" of plaintiffs and defendants in a civil action of nationwide interest was in effect for almost two months before it was held unconstitutional on a writ of mandamus sought by the Columbia Broadcasting System. And in ABC, Inc. v. Smith Cabinet Mfg. Co., 312 N.E.2d 85 (Ind. Ct. App. 1st Dist. 1974), a direct prior restraint imposed on the telecast of a program was held unconstitutional after that restraint had been in effect for 291 days after the scheduled telecast of that program. And in Cooper v. Rockford Newspapers, Inc., No. 75-222 (App. Ct. 2d Dist. Ill., Dec. 24, 1975), a direct prior restraint prohibiting a newspaper publisher from "writing editorials or edirorializing" about a libel action brought by a court official against that newspaper was in effect for almost eight months before it was finally held unconstitutional by an appellate court.

The teaching of these cases, and they are not intended to be exhaustive of the

problem, is that direct prior restraints on publication have been so infrequent that our court systems, both federal and state, arenot designed to expedite the review of such orders in a way that would even marginally prevent the grave and irreparable damage to First Amendment interests that each and every order would threaten. The recent proposal of the Legal Advisory Committee on Fair Trial and Free Press of the American Bar Association deals with this problem by recommending that expeditious review of such restrictive orders be provided, 21/ but Amicus doubts that even "expedited" review of such orders would truly suffice to prevent the massive damage capable of being inflicted by the imposition of unconstitutional direct prior restraint orders. One method of minimizing this loss would be to impose a rule automatically staying all such orders until such time as full appellate review had been afforded to any interested parties.

II.

THE FREE PRESS PROTECTIONS OF THE FIRST AMENDMENT AND THE PUBLIC TRIAL PROTECTIONS OF THE SIXTH AMENDMENT GUARANTEE PUBLIC ACCESS TO AND PUBLICATION OF INFORMATION ABOUT ALL CRITICAL STAGES OF THE PRETRIAL CRIMINAL JUSTICE PROCESS; AND THIS ISSUE SHOULD NOT BE DECIDED BY THIS COURT BECAUSE IT WAS NEITHER BRIEFED NOR ARGUED IN THE NEBRASKA COURTS BELOW

21/ Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Rev. Draft Nov. 1975), at 17.

This case was argued inthe trial court and in the Nebraska Supreme Court under an accepted assumption by all parties that Nebraska law required all pretrial proceedings to be open to the public and the press.

The court sealing issue was first raised in the Nebraska Supreme Court decision -- authorizing the trial judge to close any pretrial proceedings which he believed would elicit information "likely" to interfere with the selection of an impartial jury.

For that reason, Amicus urges this Court not to address the question of sealed court proceedings because Petitioners have had no opportunity to present evidence or argument in the courts below in support of the contention that most pretrial proceedings must be kept open under the First and Sixth Amendments.

In many ways, the authorization to conduct secret pretrial proceedings poses as much of a threat to the public's right to know about its courts as the prior restraint order barring the publication of confessions in this case. Certainly, as the New York Court of Appeals pointed out in Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 407 (1972) (where a judge sealed an entire trial), as the United States Court of Appeals for the Fifth Circuit pointed out in United States v. CBS, Inc., 497 F.2d 102 (1974) (prohibition of sketch artist attending a trial), and as pointed out by the Sixth Circuit in CBS, Inc. v. Young, 522 F.2d 234 (1975) ("relatives" of parties barred from talking to the press), the most effective and uniform method of restraining the publication of court news is simply to seal off the source of the news.

While there is always the possibility that a news organization could penetrate

this secrecy and obtain information about the proceedings from a confidential news "source," the First Amendment does not permit such severe burdens to be placed on access to news which ought to be available to the public.

This Court has recognized, for example, in Cox that post-publication criminal and civil remedies for publication of public court information are effective prior restraints.

This Court has recognized that illegally barring access by citizens to public forums to exercise their free speech rights is prior restraint on the exercise of the First Amendment rights. E.g., Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

Furthermore, in Southeastern and Carroll, this Court has imposed the most severe due process protections -- with the burden on the state -- before access to public forums can be denied to the public.

It is the contention of Amicus that the Nebraska Supreme Court decision, limiting public access to pretrial proceedings, while, by implication (relying on the ABA Standards), approving of public access during the trial itself, violates the First and Sixth Amendments.

The Nebraska Supreme Court has misconceived the nature of the public trial guarantee because pretrial proceedings are frequently the factual key to a pending criminal charge.

It is at the pretrial proceedings stage where information of government corruption and abuse -- or evidence of defense

corruption or abuse -- may be elicited. The entire dispute in United States v. United States District Court, 407 U.S. 297 (1972) -- over the constitutionality of national security wiretaps -- occurred during pretrial proceedings.

The famous 18-minute gap in the Nixon tapes was most fully brought out in a pretrial proceeding. The break-in at the office of Dr. Daniel Ellsberg was brought out in a pretrial proceeding. The use by the FBI of an informant in the Berrigan case was brought out in a pretrial proceeding. The allegations by former Vice President Spiro Agnew that the Justice Department was leaking adverse information about him to the press was brought out in a pretrial proceeding.

Furthermore, motions to suppress evidence based on illegal searches, illegal seizures and illegal entrapments are frequently accompanied by motions granted or denied during these hearings, to lower a charge, to dismiss an indictment, to sever a defendant, to strike a defense, or may result in an immediate change of plea from innocent to guilty.

Therefore, pretrial proceedings, in and of themselves, can produce important facts and key judicial decisions as to innocence or guilt -- facts and rulings as definitive and newsworthy as facts and rulings which occur in a jury trial.

It is no solution to say, as the American Bar Association Standards say, that after the trial is over, the pretrial transcript may be open to the press. The press is not in the business of writing history. News is a fungible commodity. Today's front page story on an illegal search testified to in a pretrial proceeding may be of little

or no interest three months later when the trial is over. Editors and reporters, not judges, have been given the right under the First Amendment to decide the daily flow of news about the courts.

Furthermore, authorizing sealings of pretrial proceedings raises substantial chilling effects under the First Amendment. If a news person gains access to forbidden information elicited from sealed court proceedings or documents, he may be held in contempt for refusing to reveal his source, two instances of which are now pending before this Court. Farr v. Pritchess, No. 75-444, and Rosato v. Superior Court, No. 75-919 (both pending on petitions for writs of certiorari).

It has also been suggested that a news person -- who knows that a proceeding is secret and yet induces an attorney or prosecutor to release the forbidden information -- may be liable for contempt for actively conspiring to break the court's order.

But perhaps most important, there are 1300 daily newspapers in this nation and some 3000 VHF stations. Only a very few have adequate manpower to assign dozens of reporters to sealed criminal court proceedings in an effort to obtain information which they believe would be of interest to the public and who are willing to assume the risk of being held in contempt for refusing to disclose who gave them the information and then be willing to assume the heavy legal fees associated with this type of litigation.

This Court should take judicial notice that the ordinary trial court structure in the nation is composed of judges who are generally connected to the local two-party

system, either because they must run for elected office or are appointed by those who run for office.

These local trial courts have maintained their integrity, in the face of frequent charges of political corruption against the local executive and legislative branches, pr-cisely because, until now, they believed that they had to keep open most of their proceedings to the public and the press. For this Court to give to the local juriciary the unfortunate veil of secrecy which is enjoyed by local executive and legislative bodies will certainly -- if history is any guide -- produce the same unfortunate results.

CONCLUSION

There would appear to Amicus to be no safe middleground in this dispute; either trial courts may constitutionally shut off the pretrial administration of criminal justice to the public and press or they may not. Amicus submits that, after careful consideration of the arguments advanced by Petitioners as supplemented herein, this Court, perceptive to the grave and uncontrollable dangers inherent in affirmance of the decision below, will reverse the principle that a system of direct prior restraints on press freedom is contrary to our system of government.

Respectfully submitted,

LAWRENCE SPEISER
1225 19th Street, N.W.
Washington, D.C. 20036

Attorney for The Reporters Committee for Freedom of the Press Legal Defense and Research Fund, Amicus Curiae

January 26, 1976